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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FIVE

**In re the Marriage of LESLIE  
BUCHALTER and BRIER  
BUCHALTER.**

**LESLIE BUCHALTER,**  
**Respondent,**  
**v.**  
**BRIER BUCHALTER,**  
**Appellant.**

**A133206**

**(San Mateo County  
Super. Ct. No. FAM086644)**

Brier Buchalter (husband), representing himself, appeals from the judgment of dissolution of his marriage to Leslie Buchalter (wife). He raises several issues concerning the division of the couple's property, arguing that the court erred by: (1) placing too high a valuation on the home that was the couple's primary residence during the marriage, making the amount required for him to buy out wife's community property interest too high; (2) calculating the amount of his separate property interest in that home; (3) assigning no goodwill value to a business operated by wife; (4) ordering him to give wife half of an installment payment he received for the sale of a business franchise; (5) ordering him to give wife half of the amount he withdrew from a retirement account after their separation; and (6) denying him credits against spousal support arrearages for periods of time when he alleged the couple had reconciled. We agree that

a portion of the judgment misstates husband's separate property interest in the primary residence as \$60,000 rather than \$65,000, but otherwise find no error.

#### A. FACTS AND PROCEDURAL HISTORY

Wife and husband married in August 1983 and separated in July 2003. Wife filed this action for dissolution in 2005. Husband was ordered to pay wife \$2,048 in monthly spousal support beginning October 1, 2005, which was reduced to \$694 per month commencing on May 1, 2007, and terminated on January 1, 2009. Husband made no direct support payments to wife.

In 2011, a trial was held to determine the division of marital assets and the parties' financial obligations to one another. The following evidence was presented:

When the couple married in 1983, husband and his cousin co-owned an unimproved piece of real property in Pescadero. In 1987, husband and wife bought out the cousin and took title in both their names, transmuting the property into community property. The couple had begun building on the property in late 1984, about a year into the marriage, and in 1985, they posted \$10,000 to obtain a temporary occupancy permit to live on the property. After the couple separated in July 2003, husband had exclusive use of the Pescadero home.

Upon the deaths of her mother and stepfather in 2005 and 2008, wife inherited a one-half interest in a home in San Mateo and had an opportunity to buy the remaining one-half interest from her sister for \$517,000. According to wife, she and husband agreed that husband would be awarded the Pescadero property at a set value of \$900,000, an amount based on three separate appraisals. In return, husband would pay wife about \$350,000 for her interest in the property (an amount adjusted for husband's separate property interest, tax liabilities and encumbrances). This arrangement, which was memorialized in written notes, would enable wife to put the money from her share of the Pescadero property toward the purchase of the San Mateo property.

Husband confirmed at trial that he agreed in 2008 to buy out wife's interest in the Pescadero property, but he claimed he did not remember the valuation agreed upon. In any event, he did not follow through with the buyout of wife's interest in the Pescadero

property, and wife proceeded with the purchase of the San Mateo property by obtaining a higher loan amount to make up the difference. Wife testified that husband agreed to pay her \$700 a month to compensate her for the higher mortgage payments she was required to make as a result of the higher loan, with the understanding that he would refinance the Pescadero property and pay off a portion of that loan. Husband stopped making payments after eight months and never paid off any portion of wife's loan. Husband denied that he agreed to pay her \$700 a month toward her higher mortgage payment.

Real estate appraiser Rebecca Pickart testified as an expert for wife and opined that the Pescadero property was worth \$250,000 in 1987 and \$800,000 in 2010. Her opinion was based primarily on the sales price of comparable homes in the area, taking into account such factors as acreage, ocean views, and the unfinished condition of the home on the Pescadero property. Husband's appraiser, Angelique Alexander, testified that the value of the property was \$610,000 in 2010, though she acknowledged during cross-examination that if some trees on the property were cut, the home would have panoramic ocean views warranting an upwards adjustment in value. Alexander had also used a manufactured home as a comparable, even though the home on the Pescadero property was hand-built. Taking these additional factors into account, Alexander would increase her valuation of the property by \$50,000 if the trees were topped off to provide more view, and by upwards of \$20,000 for the fact that it was not a manufactured home.

As to husband's separate interest in the Pescadero property, he testified that he had paid for improvements totaling over \$184,000 with cash that he had obtained prior to marriage from cultivating and selling marijuana. Husband claimed that at one point he had \$450,000 in cash in a safe deposit box from these illegal earnings, but he presented no receipts or other documentation of the safe deposit box or the money. Wife testified that after they were married, husband told her he did not have the money to build the house and was going to go back to dealing marijuana. Husband admitted continuing to deal drugs after the marriage, but he claimed not to have used any of the funds he earned by drug dealing during the marriage to pay for improvements to the property. Husband was convicted of a felony for selling marijuana in November 1987.

After the couple's separation, husband recouped the \$10,000 temporary occupancy bond on the Pescadero property, which, with interest, had grown to \$14,925. The Internal Revenue Service seized \$11,000, and husband did not share any of the remaining amount with wife. Also after separation, husband withdrew \$7,200 from a retirement account, netting just over \$6,000 after taxes, and did not pay wife any portion of these funds. Finally, after separation husband received a final installment payment of \$39,876 for a business franchise he had sold during the marriage. He gave wife \$15,859.25, or less than half of this amount.

Wife had started a business during the marriage called "Adventure Through Open Mind Science Club for Kids" (ATOM), an after-school enrichment program in which she teaches children about chemistry and physics. When the parties separated in 2003, the business had existed for less than a year and had no assets or capital, or any employee other than wife. A 2004 tax return showed that wife had a taxable income of \$5,105 for this business.

Husband testified that he and wife had reconciled at least three times after their separation, living together for several months at a time, a claim that wife denied.

Based on this evidence, the family court made the following findings: (1) the current market value of the Pescadero property was \$770,000, with encumbrances of \$128,000 and equity of \$642,000; (2) husband was not entitled to reimbursement for separate property funds he allegedly used to improve the property, because those funds came from illegal marijuana sales and, in any event, were not proven to have been received prior to the marriage; (3) husband's separate property interest in the Pescadero property was \$65,000, reflecting the value of the property less encumbrances (\$250,000 minus \$185,000) at the time the property was transmuted into community property in 1987; (4) husband owed wife \$1,962.50 for her one-half share of the net proceeds from the return of the temporary occupancy bond; (5) husband owed wife \$3,000 for her one-half share of the net proceeds from the retirement account; (6) husband owed wife an additional \$4,078.75 for her one-half share of the final installment payment for the sale of the business franchise; (7) no evidence had been presented that wife's ATOM business

had any value; and (8) the parties had not reconciled after their separation and husband was not entitled to an offset against his arrearages in spousal support.

The court found that husband's 2008 agreement to buy out wife's interest in the Pescadero property at a value of \$900,000 was not enforceable because it was the settlement of litigation and Code of Civil Procedure section 664.6 requires such settlements to be in writing signed by the parties or made orally before the court. The Pescadero property was awarded to husband on the condition that he pay \$288,500 to wife (her share of the property less encumbrances and husband's separate property interest) plus other funds due to her under the judgment. Husband was permitted to obtain a loan commitment for the total funds due within 45 days, with escrow on that loan to close within 45 days thereafter; otherwise, the property would be placed on the market and the sales proceeds divided between husband and wife after the payment of his separate property interest. In that event, payment of other amounts owing to wife would be made directly to wife out of husband's share of the sales proceeds.

## B. DISCUSSION

### 1. *Market Value of Pescadero Property*

Husband argues that the Pescadero property was worth less than the \$770,000 found by the court. Wife argues that her appraiser's valuation of the property supported the court's order, but that the issue has been rendered moot by subsequent events.

In support of her mootness claim, wife has filed an unopposed request that we take judicial notice of court orders showing that the Pescadero property is now being offered for sale because husband did not exercise his option to purchase her interest in the property. (See Evid. Code, §§ 452, subd. (d), 459, subd. (a).) Wife reasons that the court set the \$770,000 valuation on the property solely for the purpose of calculating the amount necessary for husband to purchase her interest; now that the house will be sold on the open market, the \$770,000 figure is irrelevant. We grant the request for judicial notice, but conclude it does not support wife's mootness claim. If husband were correct that the \$770,000 figure was too high, it might have affected his ability to secure a loan to

purchase wife's interest. We cannot say that his failure to exercise the purchase option renders moot the court's valuation of the property.

Turning to the merits, we agree with wife that the court's valuation of the property was supported by substantial evidence. (See *In re Marriage of Sivyver-Foley* (2010) 189 Cal.App.4th 521, 526.) Wife's appraiser testified that the property's 2010 market value was \$800,000, based on the sale price of comparable properties and adjustments she made to reflect the acreage, characteristics, and condition of the property. The court did not adopt that opinion wholesale, but concluded that it was worthy of greater weight than husband's expert. Also of significance is the evidence that in 2008, husband and wife had agreed the property was worth \$900,000 based on three appraisals. Though the court declined to enforce the agreement that husband would buy out wife's interest based on the \$900,000 value, that figure tended to show that the \$610,000 valuation by husband's appraiser two years later was too low.

Husband complains that wife's appraiser was a "hired gun." The resolution of an evidentiary conflict between two experts regarding valuation cannot be disturbed on appeal, and we have no power to substitute our own judgment for the trial court's. (See *In re Marriage of Burlini* (1983) 143 Cal.App.3d 65, 71; *People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1573.)<sup>1</sup>

## *2. Husband's Separate Property Interest in the Pescadero Property*

Husband complains that he used over \$184,000 of separate property funds for improvements to the Pescadero property, consisting of cash derived from marijuana dealing prior to the marriage. The court declined to order reimbursement of this amount because husband failed to prove that such funds, if they existed at all, were acquired prior to the marriage: "There was no accounting of what portion of repairs were paid from [husband's] activity in those years which led to his eventual arrest in 1987." The court

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<sup>1</sup> We deny husband's request that we take additional evidence on appeal regarding the valuation of the property. (See Code Civ. Proc., § 909.) "The power to take evidence in the Court of Appeal is never used where there is conflicting evidence in the record and substantial evidence supports the trial court's findings." (*Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1090.)

also ruled that an order for reimbursement of those funds would, effectively, condone husband's illegal activity.

Substantial evidence supports the court's conclusion that husband had not adequately traced the funds to a separate property source. (See *In re Marriage of Cochran* (2001) 87 Cal.App.4th 1050, 1057-1058.) Though husband claimed to have acquired \$450,000 in cash from marijuana sales prior to marriage, he produced no other evidence of these funds, their source, or the safe deposit box in which they were supposedly kept. Wife testified that in 1984, *after* their marriage, husband told her he was going to start selling marijuana to pay for improvements to the property. The improvements to the property were made principally in 1984 and 1985, and husband was arrested for marijuana sales in 1987. Based on this sequence of events, the court could reasonably determine that any illegal funds used to improve the property were derived from marijuana sales made after the marriage, not before. This conclusion makes it unnecessary to consider the court's alternative reason for denying separate property reimbursement—that to do so would effectively condone husband's illegal activity.

Husband also complains that in the portion of the judgment directing the disposition of the Pescadero property, the court understated by \$5,000 the amount of his separate property interest. We agree. Wife's appraiser testified that the property was worth \$250,000 in 1987, when wife was placed on the title. In reliance on this figure, the court found husband was entitled to reimbursement for his separate property interest in the equity that existed at the time of transmutation, which the court found to be \$65,000 (\$250,000 minus the \$185,000 in encumbrances that were then on the property). (See *In re Marriage of Weaver* (2005) 127 Cal.App.4th 858, 866.)

In the portion of the judgment describing the procedure to be used in the event husband did not exercise his buyout right and the home was placed on the market for sale, the court directed that husband would first receive only \$60,000 out of the sale proceeds, rather than the \$65,000 separate property interest it had previously set. Though wife suggests that this \$5,000 disparity reflects a conscious decision on the part of the court to penalize husband if he failed to exercise the buyout option and forced a sale of

the property, nothing in the record so suggests. The reference to \$60,000 appears to have been a mistake. We will order the judgment amended accordingly.

### 3. *Valuation of Wife's Business*

Husband argues that wife's ATOM business was worth \$250,000 due to its goodwill value, and that this amount should have been attributed to wife as part of their property division because the business was awarded to her. The evidence shows that wife, as a sole proprietor, started a school enrichment program shortly before her separation from husband and earned a little over \$5,000 the following year. The business had no assets or capital. The court did not abuse its discretion in placing a value of zero on the business; certainly, nothing in the record supports husband's claim that the business had a goodwill value of \$250,000. (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 197.)

### 4. *Installment Payment for Sale of Franchise*

Husband argues, with no analysis, that wife was not entitled to an additional \$4,078.75 as her share of the last installment in the sale of his business franchise. He reasons that the funds were received by him after the date of separation, apparently taking the position that the installment was, therefore, separate property. Although the installment payment was made after separation, the franchise was sold during the marriage, and there is nothing in the record to suggest the franchise was not community property.

### 5. *Disposition of Retirement Funds*

Husband argues that wife was not entitled to one-half of the funds from a retirement account that he withdrew in 2008. We disagree. The account was in existence before the parties separated in 2003, and as of 2004, its value was \$6,800. In 2008, the balance had risen to \$7,200, and husband withdrew this entire amount, netting \$6,000 after paying taxes. Husband presented no evidence showing he made separate property contributions to the account after the date of separation. (Contrast, *In re Marriage of Behrens* (1982) 137 Cal.App.3d 562, 577.)



## 6. Evidence of Reconciliation

Husband argues that he was entitled to an offset against the arrearages he owed in spousal support because the evidence established that he and wife reconciled at least three times during the period when support was owed. We disagree.

When determining whether there has been a reconciliation, the court “considers only the intent of the parties to permanently reunite as husband and wife.” (*In re Marriage of Modnick* (1983) 33 Cal.3d 897, 911, fn. 14.) “[T]he party asserting the fact of reconciliation. . . must establish by ‘clear and cogent proof’ that the spouses mutually intended to resume their marital status and to live together on a permanent basis. . . . [¶] The intention to reunite must be unconditional and contemplate a complete restoration of all marital rights.” (*Id.*, at p. 911.)

Wife testified unequivocally that the couple never reconciled after their 2003 separation, and that their post-separation relationship had been limited to meals and a family vacation with their adult children in 2008 where they all shared one motel room. The court credited wife’s testimony, finding husband’s claims of cohabitation and sexual intimacy unbelievable. It is the exclusive province of the trier of fact to determine the credibility of witnesses. (*Sabbah v. Sabbah* (2007) 151 Cal.App.4th 818, 823.)

## C. DISPOSITION

The clerk of the superior court is directed to amend the judgment as follows: The portion of the judgment found in Section I of the incorporated “Findings and Amended Orders on Reserved Issues,” under the paragraph entitled “ISSUE NUMBER FOUR: DISPOSITION OF THE PROPERTY,” shall be modified so that the fourth sentence, which currently reads, “The proceeds of the sale shall be divided so that Respondent receives the first \$60,000 and the remaining amount is divided equally between the parties,” shall instead read, “The proceeds of the sale shall be divided so that Respondent receives the first \$65,000 and the remaining amount is divided equally between the parties.” As so modified, the judgment is affirmed.

Because wife has prevailed on the majority of issues raised in this appeal, she shall recover from husband her ordinary costs on appeal.

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NEEDHAM, J.

We concur.

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JONES, P. J.

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SIMONS, J.